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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-711

WESTERN AIRLINES, INC., *Petitioner*

v.

CONTINENTAL AIR LINES, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

CONTINENTAL AIR LINES, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in Continental Airlines, Inc. v. Civil Aeronautics Board on September 22, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is printed in Appendix A hereto, and is reported at 519 F.2d 944 (D.C.Cir. 1975).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit, printed in Appendix A here-

to, was entered on September 22, 1975. Petitioner filed a motion for stay of the mandate with that court on October 10, 1975. The Court has not yet ruled on the motion for a stay of the mandate.

The jurisdiction of this Court is invoked under 49 U.S.C. § 1486(f) and 28 U.S.C. § 1254(3).

THE QUESTIONS PRESENTED

1. Did the court below erroneously interpret the Federal Aviation Act of 1958 so as to impute an importance to competitive operating authority which the Congress did not intend?

2. In deciding this case and in attempting to control the course of the proceeding before the C.A.B. on remand, did the lower court usurp functions which Congress assigned the administrative agency?

3. Should the Supreme Court exercise its supervisory powers to review the lower court's judicial activism which is evident in its decision in this case?

CONSTITUTIONAL PROVISIONS STATUTES AND RULES INVOLVED

The principal statute involved is the Federal Aviation Act of 1958, as amended (the Act), 49 U.S.C. § 1301 *et seq.* Of particular importance are 49 U.S.C. § 1302 (Declaration of Policy), § 1371 (Certificate of Public Convenience and Necessity), and § 1486 (Judicial Review of Orders). Also involved in 5 U.S.C. § 706 (Scope of Review).

The pertinent text of these provisions is set forth in Appendix B.

STATEMENT OF THE CASE

This case began in 1967 with the filing of an application to the Civil Aeronautics Board (hereinafter called the Board or the CAB) by United Airlines for improved operating authority into San Diego. After several rounds of pleadings and CAB orders, the case was eventually set for hearing as the *Additional Service to San Diego Case.* The issues were limited to the consideration of "San Diego's largest east-west long-haul markets" (J.A. 33).[1] The markets involved were San Diego on the one hand, and New York/Newark, Washington/Baltimore, Chicago, and Denver on the other hand. In the course of this proceeding the CAB awarded new nonstop service authority in each of these markets, by removing operating restrictions from carriers which already had authority to serve them.

Among other things, the Board authorized Western Air Lines, Inc. (Western) to provide nonstop service in the San Diego-Denver market, as recommended by its Administrative Law Judge (ALJ). However, on a three to two vote, it disagreed with the ALJ's decision that Continental Air Lines, Inc. (Continental) should be given competitive nonstop authority between San Diego and Denver. The Board found that Western's proposed service would be "entirely adequate to meet the service needs of the market . . .", and expressed concern that competitive nonstop service would have an adverse financial impact on Western. In view of all the circumstances the Board found ". . . it more consistent with the goal of fostering sound economic conditions in air transportation—even at the cost of foregoing some

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[1] References to J.A. relate to the joint appendix submitted by the parties in the Court below.

undoubted beyond benefits a second carrier could provide—to certificate only Western at this time." (J.A. 41)

Although the awards to Western in the San Diego-Denver market and to another carrier in the other markets at issue were made final in June of 1970 (J.A. 65), final decision on the need for a second nonstop carrier between San Diego and Denver was deferred (J.A. 65).

After further economic study the Board issued, on March 23, 1971, a Supplemental Order on Reconsideration (Order 71-3-135, J.A. 67). This order for the first time attempted a completely new economic evaluation of the effect on the incumbent, Western, of a Continental entry into the San Diego-Denver market. It was later discovered that this analysis contained a major computational error (J.A. 79). Obviously, the Board was uncomfortable with the legal posture of the case at that stage. It remanded the proceeding to the same Administrative Law Judge who handled the original phase, expressing the need for more recent factual information (Order 71-4-112, April 16, 1971, J.A. 79).

The remanded phrase was essentially a new case focusing entirely on the questions of need for competitive service in the San Diego-Denver market and selection of a carrier.

Another complete hearing was held. The same ALJ again found that service by an additional carrier was required, and again selected Continental to provide it. On review, the Board again voted three to two to reverse the ALJ (Order 72-12-29, December 8, 1972, J.A. 83).

The Board's decision started out with a summary of the Supplemental I.D. and it then stated the general theme of the decision as follows:

> ". . . we have concluded that the public convenience and necessity would be better served at this time by not authorizing competitive service in this market [footnote omitted]. Our decision reflects the belief that during a period of lagging traffic growth and retrenchment within the industry, and during the subsequent period of recovery before an adequate upward trend has been assured (both generally and in markets which may be at issue), we must be more than unusually careful to avoid impeding the industry's opportunities for full recovery."
>
> * * *
>
> "There is little question that the San Diego-Denver route offers a potential for future certification of competition. However, in the circumstances of this case—where Western's service has been, and appears likely to be, reasonably responsive to the needs of the market, and where the traffic growth in the local San Diego-Denver market, and beyond markets which would support such local operations, show no strong sign of improvement—we believe it imprudent, on balance, to certificate a second nonstop carrier where competitive service is likely to produce, at best, only marginal financial results." (Order 72-12-29 at 2-3, J.A. 85, 86)

In this context, the Board went on to make a detailed point by point analysis of each of the ALJ's findings and to discuss its disagreement with them. (J.A. 83-98)

Petitions for reconsideration of the Board's order were denied on May 3, 1974 by a two to one vote. (Order 74-5-17, J.A. 100).

Continental then petitioned the court below, pursuant to 49 U.S.C. 1486, for judicial review of Orders 72-12-29 (J.A. 83) and 74-5-17/18 (J.A. 125).

On September 22, 1975 the lower court issued its opinion and judgment, remanding the case to the Board. In deciding the case the court passed over contentions by Continental that the Board's findings were inadequate and that the orders must be set aside for "failure to engage in reasoned decision-making." Rather, the court said:

> "We believe that this case is most naturally treated as presenting a question of the existence of substantial evidence to support the CAB's rejection of the statutory interest in the promotion of competition." (Appendix A, p. 13a, note 42)

The court construed the Federal Aviation Act of 1958 as mandating the certification of competition "when sufficient traffic exists to support [it]" (Appendix A, p. 19a); and found that the substantial evidence of record does not support the Board's finding that competitive service is not required in the San Diego-Denver market. The court also concluded that the failure to authorize competitive nonstop service "is not in accord with the public interest considerations set forth in § 102 of the Act" (Appendix A, p. 4a); and that "[t]he record before us contains ample evidence of, the need for competing nonstop service." (Appendix A, p. 30a) It included a pointed suggestion that Continental, rather than any other applicant, should be awarded the authority.

In order to maintain control of further proceedings the court directed the Board not to reopen the record for the purpose of taking additional evidence without

first petitioning the court to modify its mandate. If such a petition should be filed, the court specified that the Board should set forth "with particularity the matters involved and their relationship to the desirability and feasibility of implementing competition." (Appendix A, p. 30a)

As to selection of carrier for competitive authority, the court directed the Board to review the existing record and render a supplemental order either adopting the ALJ's determination that Continental should be selected "or setting forth its separate reasons for accepting or rejecting the ALJ's selection." (Appendix A, p. 31) Acceptance of these instructions would, of course, preclude any further hearing even on new applications for San Diego-Denver authority.

REASONS FOR GRANTING THE WRIT

1. The Court Below Has Interpreted the Federal Aviation Act in a Novel Way, Never Before Passed Upon by This or Any Other Court.

The lower court's decision rests entirely on a novel and erroneous interpretation of the Federal Aviation Act which no court has adopted before in the 38-year history of the Act and its predecessor, the Civil Aeronautics Act of 1938. For that reason this court has never had an opportunity to rule on such an interpretation. If the interpretation is allowed to stand, it will remove from the CAB power to control its own docket by requiring that priority of hearing be accorded to competitive route cases. Of even more significance it will have a serious impact on the substantive decisions in such cases by creating an almost unrebuttable presumption in favor of competition.

In essence the court below interpreted the Act to give "competition" preeminence over the other public intrest goals listed in section 102 of the Act [49 U.S.C. 1302].[2] Having established, in effect, a statutory presumption that competition is required by the public interest, the court went on to evaluate the evidence of record in this light, finding that there was not substantial evidence to overcome the presumption in favor of competition. In short, the court's interpretation of Section 102 of the Act is the cornerstone of the entire decision.

The court below developed its interpretation entirely from its reading of the legislative history of the Civil Aeronautics Act and a few early CAB decisions. It cited no court cases.

a. The Legislative History.

The legislative history of the Act dealing with competition reveals two distinct dialogues.

First, the primary motivating force behind enactment of the Civil Aeronautics Act was the desire of Congress to stabilize the air transportation industry by eliminating the unrestrained competition which was threatening to destroy the system at the time.[3] Thus, the regulatory system which Congress established may be characterized as one which was designed basically to control competition. We do not understand that the lower court disagrees with this premise.

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[2] The language of Section 102 has remained unchanged since 1938 although the original Civil Aeronautics Act of 1938 has been reenacted as the Federal Aviation Act of 1958.

[3] *See e.g.*, S.Rep.No. 1661, 75th Cong., 3rd Sess. (1938); H.R. Rep.No. 911, 75th Cong., 1st Sess. 19 (1937); 83 Cong.Rec. 6507 (1938); 83 Cong.Rec. 8890 (1937).

Second, the legislators were concerned that the entire air transportation system might fall into the hands of a few monopoly operators. The proposed act included a provision for the award of grandfather rights to the existing mail contract carriers and there was a fear that this would "freeze the present air service," and would create "a monopoly with the present contractors." (Testimony of Mr. Crowley, Solicitor Post Office Department, Hearings on S. 2 & S. 1760 Before the Subcommittee of the Senate Committee on Interstate Commerce, 75th Cong., 1st. Sess. 118 (1937)). There was also a concern that the Act's provisions, which exempted air carriers from the formerly applicable anti-trust laws, would permit monopoly systems to develop through consolidations or mergers. (Hearing testimony of Mr. Crowley, *supra* at 118; Letter from Mr. Farley, Postmaster General, Hearings on S. 2 & S. 1760, *supra* at 139; 83 Cong.Rec. 6728-6731 (1938)). In other words, some congressmen wanted to insure that the new regulatory statute would not create an air transportation system consisting of a few large carriers operating over basically non-competitive route systems.

This problem produced considerable colloquy in the debates, and drew several statements by Senator McCarran, the bill's author, and others to the effect that no such result was intended, and indeed, that there had been provisions built into the Act to preclude such developments. (83 Cong.Rec. 6729 (1938) remarks of Senator McCarran; 81 Cong.Rec. 9214 (1937) remarks of Senator Wheeler; 83 Cong.Rec. 6730 (1938) remarks of Senator Copeland).

The court below inferred from these broad, general anti-trust, anti-monopoly expressions of the legisla-

tors, a meaning beyond their true intention. It imputed to them a legislative "mandate" for the authorization of competitive nonstop service where sufficient traffic exists *on a particular route* to support competition *on that route.*

We have been able to find only one place in the legislative history of the Act in which a statement was made as to competition with regard to a particular route. That is the discussion at 83 Cong. Rec. 6852 (1938) cited by the lower court where reference is made to United Air Lines' service between Salt Lake City and Chicago (Appendix A, p. 16a). In context, it is obvious that this statement also arose out of a discussion of the possibility that the systems of existing carriers would be frozen by the "grandfather" clause of the Act. Senator McCarran was simply assuring Senator King that under the provisions of the Act there would be no such result. The "Authority" (the Civil Aeronautics Board) would be able to investigate the need for service on the route, and award competitive authority if it were required. In other words, the Act did not, by its terms, freeze a route into a non-competitive mold.

> ". . . we are trying to set up a non-political agency that will go into matters such as the one I have tried to illustrate. . ."
>
> "That is the object and purpose of the entire bill. It is not to say that any line may be 'frozen' nor that any line may be perpetuated, nor that any monopoly over any terrain may be established to the exclusion of the necessity which the public may present." (83 Cong.Rec. 6852.)

With this background it is apparent Congress contemplated that as to Section 102(d) the emphasis would be, not on the word "competition," but rather on the

remainder of the phrase: ". . . to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." To determine what extent is necessary, the CAB was established and given a "high degree of flexibility" to perform its functions under the Act.[4]

b. The C.A.B.'s Interpretation.

The court below also purports to find support in CAB decisions for its position that competition is entitled to a preeminent position in the Act's policy guidelines. It refers to statements in a few isolated cases which, by themselves, seem to lend credence to the findings.

However, when the pattern of Board decisions over the years is considered, the view is quite different. There has been overall increase in amount of competition among the airlines. But there have also been definite periods of remission of competitive awards as economic factors have dictated.

In its early years the Board was extremely cautious about awarding competitive authority, and in some cases it refused to make a competitive award because of the existence of adequate service.[5]

One of the Board's earliest impressions of its responsibility under the Act to permit competition to the extent necessary is found in *American Export,* 2 C.A.B.

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[4] 83 Cong. Rec. 6731 (1938).

16 at 31, which was cited by the lower court in support of its position. There the Board said:

> "We conclude that competition in air transportation is not mandatory, especially when considered in relation to any particular route or service. Clearly, Congress has left to the discretion of the Board the determination of whether or not competition in a particular area is necessary to assure the sound development of an appropriate air transportation system."

Under the circumstances of that case the Board awarded a competitive route; but the underlying theory of the case was obviously quite different from that imputed to it by the court. In another case reported in the same volume of the CAB Reports (2 C.A.B. 627 at 652) the Board refused to award competitive authority on another route partly because:

> ". . . the record does not indicate that the present service over Route No. 7 is inadequate or that the present operator thereof is incapable of accommodating the natural growth of air traffic which can be foreseen at this time. Under these conditions, the contention that there should be competing, duplicating services between two points merely to prevent one Government regulated carrier from dominating that field is unimpressive."

In the economic boom years of the mid 1950's, the Board set down a number of major route cases which were designed to reappraise the entire domestic route

[5] *E.g.*, National Air., et al., Daytona Beach-Jacksonville, 1 C.A.A. 612 (1940); American Export Air., Trans-Atlantic Service, 2 C.A.B. 16, 31 (1940); Northwest Air. et al., Additional Service to Canada, 2 C.A.B. 627, 652 (1941); Great Lakes Area Case, 8 C.A.B. 360, 382 (1947).

system.[6] It is to individual cases of this period which the lower court pointed primarily for statements in support of its views of the Board's obligations with regard to authorization of competitive service (Appendix A, p. 18a, notes 57, 58).

In the early cases in this group the Board indicated that the certification of significant amounts of new competition was a departure from the more cautious approach it had followed earlier. It noted that its new policy of "greater freedom" with regard to competitive route awards was justified by the general improvement in the overall strength of the industry; but even so, the Board recognized its obligation to control *excess* competition which could "bring uneconomical conditions and jeopardize the development of that sound system of air transportation which is the ultimate objective of the Act." *Southwest-Northeast Service Case,* 22 C.A.B. 52, 75 (1953). It found that the statute does not insist on competition on all routes or in all services. Rather, it is in the discretion of the Board to provide essential competition. *Railway Express, Airfreight Forwarder Application,* 27 C.A.B. 500, 534 (1958).

In the late 50's the Board reverted to a more cautious approach to competitive service. The *Southern Transcontinental Service Case,* 33 C.A.B. 701 (1961) was in-

[6] *E.g.*, Southwest-Northeast Service Case, 22 C.A.B. 52 (1955); New York-Chicago Service (Northwest Restriction), 23 C.A.B. 943 (1956); Syracuse-New York City Case, 24 C.A.B. 770 (1957); New York-Florida Case, 24 C.A.B. 94 (1956); Great Lakes-Southeast Service Case, 27 C.A.B. 829 (1958); Dallas to the West Service Case, Order on Reconsideration, 28 C.A.B. 590 (1959); New York-San Francisco Nonstop Service Case, 29 C.A.B. 811 (1959).

stituted in 1958 and, at that time it was considered to be the last major domestic route proceeding. That case was decided in 1961.

The Board awarded new competitive service in several of the larger markets involved in *Southern Transcontinental Case,* but it found that no new authority should be awarded in other markets. It stated:

> "In meeting these air service needs, however, we have done so in a manner which we believe will adequately meet the present and future air transportation requirements of the area while at the same time giving full recognition to the effect which the use of jet aircraft with its greatly expanded capacity will have on the needs of the individual markets and limiting duplicating service to those markets which we fully expect will produce a volume of traffic sufficient to support more than one carrier (33 C.A.B. at 710).

Thus, the Board used a major, general economic consideration affecting air transportation for the entire industry in the early 60's—the introduction of high capacity jet aircraft—as a moderating factor on competitive route awards. The Board went on to say:

> ". . . the mere fact that other markets of similar or even smaller size are authorized to receive service by more than one carrier is not dispositive of whether competitive service is required here. The extent of competition in any given market necessarily turns upon the facts and circumstances peculiar to that market." (33 C.A.B. at 715.)

From 1961 until 1968 the Board did not decide a significant, competitive, domestic route case (although it did commence a number of new cases after 1965 as general economic conditions improved). Rather, it concentrated its efforts on improving efficiency of local service carriers and on cases involving the authorization of first single-plane service,[7] in markets which formerly had only connecting or equipment interchange service.

In the latter category, the leading case of the period was probably the *Pacific Northwest-Southwest Service Investigation,* 46 C.A.B. 654 (1967), modified 46 C.A.B. 652 (1967). The case was commenced in 1964 but was not decided until April, 1967. The Board did authorize competitive service in one market—Denver-Kansas City—but the basic thrust of its decision was the award of first through-plane authority in markets which did not have it before. In overruling the finding of the Examiner that competitive routings by Braniff and Continental should be established on the major Pacific Northwest-Southwest routes at issue in the case, the Board stated:

> "While we agree that each of these carriers should be awarded Pacific Northwest-Southwest authority, we will establish two non-competitive routings . . .
>
> * * *
>
> This noncompetitive two-carrier pattern will insure provision of the needed service and full development of the traffic potential, but at the same time it will avoid the risk of so diluting the traffic as to interfere with the objective of providing on an economical basis the expedited long-haul services

[7] *See e.g.,* Mohawk Route 94 Realignment, 46 C.A.B. 111 (1967). Some of the improvement was accomplished by the elimination of excess competitive authority. Wyoming-South Dakota-Chicago Service, 36 C.A.B. 703, 752-53 (1962); Trans World Airlines, Service at Reading, 37 C.A.B. 227 (1962); American Airlines, Akron Service, 37 C.A.B. 606 (1963).

which are the primary need shown by this record." (46 C.A.B. at 667-68.)[8]

The mid-1960's were again a period of economic well-being, as the initial break-in period of the jets came to a close and the carriers began to realize the benefits of the increased productivity of the new equipment. The Board broke its period of relative inactivity in the routes area and began setting down a series of significant domestic route cases which resulted in a spate of competitive route awards in the years 1968 through 1970.[9] It was in this climate that the relatively simple *Additional Service to San Diego Case*, which is now before the court, was instituted.

By the time the ALJ's decision had been issued in 1969, the tide had already begun to ebb once more. In 1968 the domestic trunklines realized net profits of

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[8] The Board estimated that Braniff should develop in 1968 123,000 O&D and connecting passengers on its route, and that Continental should obtain 265,000 local and connecting passengers on its route. (46 C.A.B. at 668.) These markets were potentially as large or larger than the San Diego-Denver market at issue here.

[9] The more significant of these cases were: Southern Tier Competitive Nonstop Investigation, C.A.B. Docket 18257, Orders 69-7-135 (July 24, 1969), 69-9-11 (September 18, 1969); Service to Albuquerque Case, C.A.B. Docket 18586, Orders 69-7-136 (July 24, 1969), 69-9-10 (September 18, 1969); Twin Cities-Milwaukee Long-Haul Investigation, C.A.B. Docket 19097, Order 70-6-36 (June 4, 1970); Gulf States-Midwest Points Service Investigation, C.A.B. Dockets 17726 et al., Orders 69-5-25 (May 5, 1969), 69-9-18 (September 3, 1969); Dallas/Ft. Worth-Phoenix Nonstop Service Case, C.A.B. Docket 18579, Order 69-7-137 (July 24, 1969); Pacific Northwest-Southwest Service Investigation, Reopened, C.A.B. Dockets 15459 et al., Orders 69-4-11 (April 2, 1969), 69-10-163 (October 31, 1969).

about half the size of their 1967 boom year experience [10] and by the end of 1969, after the ALJ's I.D. in September, the profit figures had dropped by another 28 percent. In 1970, the year of the Board's first opinion and order, the trunkline industry experienced a net loss of over $100,000,000, the most severe in its history. It was this change which led the Board to note "the recent lag in nationwide traffic growth" (Order 70-4-46 at 4, J.A. 41) as an element which indicated that the Examiner's optimism for profitable operations between San Diego and Denver was unwarranted.

As the Board noted in a later order in this case (Order 74-5-17 at 4-5, J.A. 103, 104) the statement in Order 70-4-46 "sounded one of [the] earliest notes of caution with respect to declining traffic growth, the profit picture within the industry, and the hazards of overcapacity."

The discussion above, although somewhat tedious, is necessary to show that the CAB's view of its responsibilities with regard to the authorization of competitive service cannot be determined from separate statements of policy gleaned from individual cases. It must be

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[10] The profit information used in this paragraph has been taken directly from a publication entitled *Air Carrier Financial Statistics* which is prepared by the CAB's Bureau of Accounts and Statistics. It listed as one of the items of which the CAB takes official notice under the provisions of Rule 24(m) of its Rules of Practice (14 C.F.R. § 302.24(m). This publication shows the following net income [losses], after special items, for the domestic trunkline industry in the respective calendar year: 1960; $68,000; 1961, [$34,568,000]; 1962, $8,196,000; 1963, $13,117,000; 1964, $134,362,000; 1965, $221,889,000; 1966, $238,636,000; 1967, $244,475,000; 1968, $126,521,000; 1969, $90,592,000; 1970, [$100,412,000]; 1971, $48,182,000; 1972, $177,154,000; 1973, $142,930,000.

viewed in the light of the entire history of the Board. The court below failed to do this.

It was for the very purpose of meeting changing conditions in a rapidly developing airline system that the Congress gave the CAB a high degree of flexibility and discretion.[11] Therefore, it is not surprising that the Board's view of competition "to the extent necessary" changed from time to time, during the history of the Act, with the change in economic forces and the succession of different views which accompanied the departure and arrival of individual Board members.[12]

We submit that the court below was wrong in its interpretation of the Act to give competition a place of preeminence among the other policy guidelines.

Moreover, the court's interpretation, if allowed to stand, will have a profound effect on the substantive and procedural aspects of the Board's activity. Because of its limited capability to hear all matters submitted to its attention the Board has always been selective in setting applications for hearing; setting priorities on the basis of the general guidelines set forth in section 399.60 of its published Policy Statements [14 C.F.R. § 399.60]. Adherence to the theory behind the lower

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[11] Outagmie County v. C.A.B., 355 F.2d 900, 908 (7th Cir. 1966).

[12] Judge Prettyman's insight into the need for flexibility to meet change as expressed in Pinellas Broadcasting Co. v. F.C.C., 230 F.2d 204, 206 (D.C.Cir. 1956) is particularly applicable here:

> "... it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes ... All such matters are for Congress and the executive and their agencies. They are political in the high sense of that abused term. They are not for the judiciary."

court's interpretation of the Act in this case could force the Board to realign its priority system so as to give preference to cases involving competitive service, even over cases involving first certificated service, or those which might reduce federal subsidy payments or increase economy of operations.

Once a competitive route case is set down for hearing, the lower court's policy interpretation would establish a presumption favoring competitive service. This would shift the traditional burden of proof from the applicant in the case and onto the incumbent. The whole tenor of the proceeding would change. Instead of, as now, the applicant being faced with the obligation of proving that the public convenience and necessity require competition, and the incumbent having the burden of showing adverse economic impact on its operations, the incumbent would have to bear the entire burden of overcoming the presumption in favor of competition. Presumably, the quality of service provided by the incumbent would no longer be important. Neither would the negative impact of the loss of revenues over the route at issue on the remainder of the incumbent's system, since under the court's interpretation competition would be mandated "when sufficient traffic [in the relevant market] exists to support competition."

These are considerations of great moment which flow naturally from the lower court's interpretation of the Act in this case, and which merit the Supreme Court's attention. We respectfully urge the court to grant certiorari and to provide guidance for the CAB and the court below in the interests of all concerned with the area of regulation performed by the Board.

2. In Deciding This Case the Lower Court Usurped Functions Which Congress Assigned the Administrative Agency, and Its Decision Is in Conflict with Decisions of This Court Defining the Appropriate Scope of Review.

The scope of review by the lower court is controlled by section 1006(e) of the Federal Aviation Act [49 U.S.C. § 1486]. The Supreme Court has, in a number of opinions, specifically defined the scope of review under these or similar statutes.

The court below chose to test the Board's decision in this case on the basis of "substantial evidence," rather than on the adequacy of the findings.

We submit that a careful analysis of the entire opinion reveals that the court chose the "substantial evidence" test because it wanted to control the future course of the proceeding before the agency and to mandate a Board decision, without further hearings, favoring the award of competitive nonstop service between San Diego and Denver, and probably favoring the selection of Continental Air Lines to provide the services.

Thus, the court went well beyond a finding that substantial evidence does not support the Board's decision that competitive service is not required in the market. It also found that "[t]he record before us contains ample evidence of the need for competing nonstop service." (Appendix A, p. 30a). As to selection of carrier it noted that the issue ". . . has also been fully fleshed out in the previous hearing," (Appendix A, p. 30a) and that the ALJ had twice selected Continental over other applicants. Mentioning the advantages of selecting Continental, the court directed the Board to review the present record and to ". . . render a supplemental order either adopting the ALJ's determination

or setting forth its separate reasons for accepting or rejecting the ALJ's selection." (Appendix A, p. 31a).

As to further hearings the court stated:

> "To avoid any unnecessary delay, we note that if the Board should invoke the procedure of petitioning this court to modify its mandate to permit taking of additional evidence on the pendency of this appeal, it should set forth with particularity the matters involved and their relationship to the desireability and feasibility of implementing competition." (Appendix A, p. 30a)

This statement can only be read as a requirement that the Board seek court permission before holding further hearings. It also means that the court is reserving in itself the discretion to deny such permission.

The CAB is one of those administrative agencies established by Congress to maintain a regulatory grip on a dynamic industry.[13] Therefore, Congress gave it broad discretionary powers to adapt rules and policies to the demands of changing circumstances.[14] The flexibility and adaptability to meet the needs of a volatile and changing economy is an essential part of the office of a regulatory agency.[15] The delegation by Congress of the authority to act in accordance with the "public interest" or "public convenience and necessity" [49 U.S.C. § 1302] ". . . serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative pol-

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[13] Outagmie County, Wis. v. C.A.B., 355 F.2d at 908.

[14] *Cf.* Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

[15] American Trucking Ass'n v. A.T. & S.F.R. Co., 387 U.S. 397, 416 (1967).

icy." [16] Where a judgment is within an area which Congress had determined is best left to the discretion of an administrative agency, a reviewing court may not substitute its judgment for that of the agency.[17]

An examination of that lower court's opinion shows clearly that the lower court has substituted its judgment for that of the CAB, contrary to applicable decisions of the Supreme Court.

Moreover, the court has attempted to dictate the Board's decision on remand. This also was in conflict with applicable decisions of the Supreme Court.

The function of a reviewing court ends when an error of law—in this case lack of substantial evidence—is laid bare.[18] Once a case is remanded, the agency should have the flexibility to take such steps as are necessary to enforce the legislative policy committed to its charge.

> "Thus when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency's order, is ordinarily the reviewing court's proper course." [19]

The reviewing court may not mandate the way in which an agency performs the legislative function it

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[16] F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

[17] S.E.C. v. Chenery Corp., 332 U.S. 194, 209 (1947); Burlington Truck Lines v. U.S., 371 U.S. 156, 169 (1962).

[18] F.P.C. v. Idaho Power Co., 344 U.S. 17, 20 (1952); F.C.C. v. Pottsville Broadcasting Co., *supra* note 16; F.T.C. v. Morton Salt Co., 334 U.S. 37 (1948); N.L.R.B. v. Food Store Employees, 417 U.S. 1 (1974).

[19] N.L.R.B. v. Food Store Employees, *supra*, 417 U.S. at 10.

has been delegated by Congress.[20] This holds true even though delay and hardship may result from the agency's procedures.[21]

> "... courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great degree as the courts' [cite omitted]. Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies." [22]

We submit that the action of the lower court here, however well intentioned, is clearly in conflict with the *Pottsville* case and related cases decided by the Supreme Court.

While it may be argued that the lower court did not issue a mandamus as in *Pottsville* or that it did not actually modify an agency decision as in *Chenery* [23] or *Food Store Employees,*[24] it is apparent that court intends its decision to have that effect, and we must assume that the lower court will take further steps to impose its will on the agency. At the very least, the reservation in the court of power to approve or disapprove further hearings brings powerful pressures on the Board to comply with the Court's wishes.

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[20] F.C.C. v. Pottsville, *supra*, 309 U.S. at 145.

[21] *Id.* at 146.

[22] *Id.*

[23] S.E.C. v. Chenery Corp., *supra*.

[24] N.L.R.B. v. Food Store Employees, *supra*.

It seems clear from the opinion that the court would not permit further hearings on the question of need for competitive service. We may also assume that the court would not allow further hearings on selection of carrier until the Board complies with the direction to review the present record and ". . . render a supplemental order either adopting the ALJ's determination [on selection of Continental] or setting forth its separate reasons for accepting or rejecting the ALJ's selection." (Appendix A, p. 31a)

The court's constraints on additional hearings is particularly inappropriate in view of the very significant changes in circumstances which have occurred since the year ended June 30, 1971, the base year for traffic forecasting in this case, and even since May of 1974 when the most recent Board order in this case was issued. While the air transportation industry recovered briefly from the almost disastrous position it was in in 1970 and 1971, recent results indicate another serious economic downturn, principally because of rapidly escalating costs. Total operating expenses for the domestic trunkline systems increased by about 42 percent between calendar year 1971 and the end of calendar year 1974.[25] The inflationary spiral has caused all of the carriers to seek approval from the Board of fare increases during 1975.[26]

Circumstances involved in Continental's service have also changed. Footnote 12 of the court's opinion (Appendix A, p. 5a) noted several factors cited by the ALJ as favoring his selection of Continental. The low fare economy service which the ALJ found attractive has since been found to be illegal by the Board. Moreover, Continental no longer offers 3-2 seating in its economy and coach sections, but has reverted to the "less comfortable" 3-3 seating.

[25] Taken from C.A.B. published *Air Carrier Financial Statistics*. These materials are officially noticeable under C.A.B. regulations. 14 C.F.R. § 302.24(m).

[26] The cost increases are largely attributable to the secondary effect of actions by the foreign oil cartel which first created the fuel shortages mentioned by the Board in Order 74-5-17 (J.A. 100, 112).

The court noted Western's "brightened" financial situation in May of 1974, accepting a statement in Continental's brief that Western's rate of return for the preceding year had exceeded "the 12% level found 'reasonable' by the Board in its Domestic Passenger Fare Investigation." (Appendix A, p. 25a) Western's company records for the year ended September 30, 1975 indicate that the carrier's rate of return has slipped significantly below the "reasonable" level to 8.9%.

Company records also indicate that traffic in the San Diego-Denver market for the year ended September 30, 1975 has remained static as compared with the preceding year, and that load factors in the market have declined slightly.

These, of course, are all facts which are relevant to the present need for competitive service between Denver and San Diego and the issue of selection of carrier; but which are not now in the record.

There was also much controversy in the Board proceeding about the quality of service in the San Diego-Denver market as measured by Western's load factors; Continental and the ALJ claiming that they were much too high (J.A. 17-21), and the Board explaining why

they were reasonable (J.A. 87-89). All of this discussion is now superfluous because the Board has recently instituted a rulemaking proceeding for the express purpose of evaluating a new policy with regard to load factors in the light of today's economic climate (Advance Notice of Proposed Rulemaking PSDR-43, 40 F.R. 37048, August 25, 1975). Although the proceeding is directed primarily to establishing load factor standards for ratemaking purposes, there is no doubt that the result will have a carry-over impact on route proceedings.

Finally, there have been significant changes in the Board itself since the last order was issued in this case.

The ALJ has retired. Only two of the Board members who participated in the decisions under review remain on the Board—one from the majority and one from the minority. This means that, in order to get a quorum necessary to carry out the court's mandate to decide the case on the basis of the existing record, one or more Board members would be required to qualify himself by reading an extensive record which is now over five years old. Even after reviewing the record, the new members would apparently not have the prerogatives normally available to them in a case of first impression. They would be constrained to vote in accordance with the directions of the court's mandate.

3. The Court Below Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as To Require Supervision and Guidance by the Supreme Court.

The lower court's decision in this case is the most recent product of several years of "judicial activism" by the D.C. Circuit toward actions of administrative agencies. This "activism" is well known, and has drawn

the attention of several legal scholars.[27] Some of the comment is favorable,[28] and other is adverse;[29] but it cannot be denied that the court's position has been recognized as an important phenomenon.

The activist stance is relatively recent and represents a radical change in the D.C. Circuit's prior view as to its relationship with the administrative agencies.

The court's former view was in line with the Supreme Court's decisions in *Pottsville* and *Chenery* to the effect that the courts must not assume what is essentially a function of the administrative agency. This view is exemplified by the following quote from Judge Prettyman's opinion in *Pinellas Broadcasting Co.* v. *F.C.C.*, 230 F.2d 204, 206 (D.C. Cir. 1956):

> "The controversy is in an area into which the courts are seldom justified in intruding. The selection of an awardee from among several qualified applicants is basically a matter of judgment, often difficult and delicate, entrusted by the Congress to the administrative agency. The decisive factors in comparable selections may well vary; sometimes one applicant is superior to another in one respect, whereas in another case one applicant may be superior to its rivals in another feature. And it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dic-

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[27] *See e.g.*, Schotland, *Scope of Review of Administrative Action—Remarks Before the D.C. Circuit Judicial Conference*, 34 Fed.Bar 54 (1974).

[28] Paper, *Judicial Scrutiny of the F.C.C.: The Illusion of Usurpation*, 52 Bos.U.L.Rev. 659 (1972).

[29] Gardner and Greenberger, *Judicial Review of Administrative Action and Responsible Government*, 63 Geo.L.J. 7 (1974).

> tates changes. Two diametrically opposite schools of thought in respect to the public welfare may both be rational; e.g., both free trade and protective tariff are rational positions. All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary."

This should be compared with the court's more recent position as expressed by Judge Leventhal in *International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615, 648 (D.C.Cir. 1973):

> "It is with even more diffidence that a court concludes that the law, as judicially construed, requires a different approach from that taken by an official or agency with technical expertise. Yet this is an inescapable aspect of the judicial condition, though we stay mindful of the overreaching consideration that a court's role on judicial review embraces that of a constructive cooperation with the agency involved in furtherance of the public interest."

The Prettyman court would not have tried to direct the course of CAB proceedings on remand in a case of this nature, or to interfere with the Board's powers to select a carrier in a route proceeding.[30] The Leventhal court in the instant case has found that the substantial evidence requires competitive service in a specific market; has indicated a strong preference for a particular airline to provide the competitive service; and has directed the Board to review the existing record and render a supplemental order either adopting the ALJ's

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[30] *See:* State Airlines v. C.A.B., 174 F.2d 510, 518 (D.C.Cir. 1949), *rev'd on other grounds,* 338 U.S. 572 (1950).

decision that the preferred carrier be selected, or setting forth reasons why not.

The new "activism" is founded on the concept adopted by Judge Leventhal for the first time in *Niagara Mohawk Power Corp.* v. *F.P.C.*[31] Judge Leventhal expanded on the principle in *Greater Boston Television* v. *F.C.C.,*[32] which has since become the basis for the development of a substantial body of case law, all in the District of Columbia Circuit.[33] Although some reservations have been expressed by Judges of the Court about the propriety and feasibility of the expanded scope of review,[34] it is firmly embedded in the case law of the Circuit, and will remain so until review by the Supreme Court.

Under the D.C. Circuit's "partnership" theory the court on review is entitled to substitute its judgment for that of the agency, and that is exactly what has been done here.

So far as we know, the Supreme Court has not considered the new activism or the "partnership" theory. Moreover, we have been unable to uncover any decisions in other circuits which have adopted the "part-

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[31] 379 F.2d 153, 160 (D.C.Cir.1967), *cert.den.* 393 U.S. 1085.

[32] 444 F.2d 841 (D.C.Cir. 1970), *cert.den.* 403 U.S. 923 (1971).

[33] *E.g.*, Alabama Power Co. v. F.P.C., 450 F.2d 716 (D.C. Cir. 1971); City of Lafayette, La. v. S.E.C., 454 F.2d 941 (D.C.Cir. 1971); Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C.Cir. 1972). *See also* the dissent of Judge Leventhal in Sindicato Puertoriqueno de Trabajadores v. Hodgson, 448 F.2d 1161 (D.C.Cir. 1971), *cert.den.* 404 U.S. 1025, where he argues for a more flexible scope of review than adopted by the majority.

[34] See: Judge Robb's dissent in Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C.Cir. 1971), and statement of Judge McGowan in Union of Concerned Scientists v. A.E.C., 499 F.2d 1069, 1094 (D.C.Cir. 1974).

nership" theory. In fact, the prevailing law in other circuits is consistently the view that a court shall not substitute its judgment for that of the agency.[35]

Since the D.C. Circuit reviews many more administrative cases than other circuits, its partnership theory is bound to be picked up elsewhere as substantive law. Therefore, the ideal time for review and guidance by the Supreme Court is now, while the concept resides wholly in the District of Columbia.

The question is undoubtedly an important one. It is important from the standpoint of the parties whose rights are determined by administrative action. It is important in terms of the quality of the work performed by the administrative agencies.[36] But it is also extremely important in the context of today's overcrowded court dockets. As Judge McGowan stated in *Union of Concerned Scientists* v. *A.E.C.*, 499 F.2d 1069, 1094 (D.C.Cir. 1974):

> "it is patent from the foregoing that despite the procedural nature of the issues raised, we have had to deal with subject matter ranging far beyond the

[35] *E.g.*, Colonial Stores, Inc. v. F.T.C., 450 F.2d 733 (5th Cir. 1971); Chrysler Corp. v. Dep't of Transp., 472 F.2d 659 (6th Cir. 1972); Why? Ass'n v. Burns, 372 F.Supp. 223 (Conn. 1974).

[36] *See* Pottsville, 309 U.S. at 146, where the Court said: "Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."

> normal ken of judges. *This case is only one among many such these days, and thus, suggests the extraordinary tasks that the seemingly endless statutory proliferation of judicial review of agency action is imposing on the federal courts.* How meaningful judicial review on this scale can be over any sustained period of time, at least if not invariably invoked with an acute sense of responsibility and a willingness to recognize that many of these more esoteric battles must largely be won or lost at the agency level, is problematic. (emphasis supplied)

One commentator points out that, in 1973, the D.C. Circuit remanded for further proceedings 61 percent of the administrative cases it reviewed.[37] It is obvious that court burden and delay will increase as the court injects itself more and more into its "partnership" with the agencies.

The time is ripe for the Supreme Court to exercise its power of supervision. All of the meaningful decisions on scope of review were issued in the late 1940's and early 1950's shortly after adoption of the Administrative Procedure Act. None of them anticipated the "broad judicial activism" now being practiced in the D.C. Circuit. The lower court, as well as the courts of other circuits, needs fresh guidance.

[37] Gardner and Greenberger, *supra* note 16, at 37.

CONCLUSION

For the reasons aforesaid, petitioner respectfully requests that this honorable court grant this Petition for Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the District of Columbia Circuit

No. 74-1651

CONTINENTAL AIR LINES, INC.

v.

CIVIL AERONAUTICS BOARD

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

No 74-1651

CONTINENTAL AIR LINES, INC., *Petitioner,*

v

CIVIL AERONAUTICS BOARD, *Respondent,*

Western Air Lines, Inc., Hughes Air Corporation, d/b/a Hughes Airwest United Air Lines, Inc., Trans World Air Lines, Inc., of Kansas City, Missouri and Chamber of Commerce of Greater Kansas City, City and County of Denver, Colorado, Public Utilities Commission of the State of Colorado, San Diego Unified Port District, the City of San Diego, San Diego Chamber of Commerce, Intervenors.

Argued April 11, 1975

Decided Sept. 22, 1975

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Before WRIGHT and LEVENTHAL, *Circuit Judges, and* WEIGEL,* United States District Judge for the Northern District of California.

Opinion for the Court filed by Circuit Judge Leventhal

LEVENTHAL, Circuit Judge:

Continental Air Lines, Inc. petitions for review of two orders of the Civil Aeronautics Board (CAB) entered in the Board's Additional Service to San Diego Case. The Challenged orders—Order 72-12-29, December 8, 1972, and Order 74-5-17, May 3, 1974—rejected the recommendations of the Administrative Law Judge (ALJ) that competitive nonstop authority be certificated between San Diego and Denver.[1] The ALJ had selected Continental to provide the competitive service.

Petitioner contends that the Board's order should be set aside on the ground that the CAB "failed to give adequate weight to the statutory mandate favoring competition" and "failed to engage in reasoned decision-making."[2] The Board responds that its orders were adequately supported by the need for caution at a time when the industry was "plagued by retrenchment and lagging traffic growth" and by the "crucial problem of diminished fuel supplies."[3]

We find that, as a general matter, § 102 of the Federal Aviation Act requires the Board to foster competition as a means of enhancing the development and improvement of air transportation service on routes generating sufficient traffic to support competing carriers.[4] We are cogni-

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* Sitting by designation pursuant to 28 U.S.C. § 292(d).

[1] The challenged orders are set forth at JA 83-98 and JA 100-24, respectively.

[2] Brief for Petitioner at 18, 31.

[3] Order 74-5-17, May 3, 1974, at 2, 13, JA 101, 112.

[4] *See* text accompanying notes 44-61 *infra*.

Section 102 of the Federal Aviation Act, 49 U.S.C. § 1302 (1970),

zant that in some circumstances the other considerations set forth in § 102 may conflict with and predominate over the public interest in competition.[5] The Board urges in effect that here the need to foster sound economic conditions in view of the industry's financial posture and the fuel situation overrides the benefits of competition. After a careful examination of the record, we conclude that the Board's position is not supported by substantial evidence

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states:

§ 1302. Consideration of matters in public interest by Board.

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics. (Pub.L. 85-726, Title I, § 102. Aug. 23, 1958, 72 Stat. 740.)

[5] *See United States v. CAB*, —— U.S.App.D.C. ——, ——, 511 F.2d 1315, 1322 (1975) ("the statute would appear to contemplate that the factor of competition could be outweighed by one or more of the other factors").

and that its rejection of competitive nonstop service in the San Diego Denver market is not in accord with the public interest considerations set forth in § 102 of the Act. Accordingly, we remand the case for further proceedings consistent with Part IV of this opinion.

I. *Background*

We begin with a summary of the seven years of administrative proceedings culminating in the orders under review.

The challenge orders are the last of a series of CAB rulings entered in the Additional Service to San Diego Case. That proceeding arose out of an application filed by United Air Lines on January 12, 1967, requesting permission to provide nonstop service in several San Diego markets.[6] On May 26, 1967, the CAB issued a show cause order which rejected United's San Diego-Denver nonstop request, but proposed to give United nonstop authorization for the San Diego-New York and San Diego-Chicago routes.[7] In response to the City of Denver's petition for reconsideration, the Board *sua sponte* issued a second order to show cause why Western Air Lines, the primary San Diego-Denver carrier, should not be permitted to provide nonstop service in that market.[8] The Board's proposals prompted numerous objections and competitive filings from other airlines. By order of April 3, 1968, the CAB instituted the Additional Service to San Diego Case, setting a consolidated hearing on applications for nonstop

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[6] *See* Initial Decision of Hyman Goldberg, Hearing Examiner, September 4, 1969, at 2, JA 373.

[7] Order to Show Cause, Order No. E-25202, May 26, 1967, at 4, JA 24.

[8] Order to Show Cause, Order No. E-25727, September 22, 1967, at 1 & n. 1, JA 27 & n. 1.

authority between San Diego and New York/Newark, Washington/Baltimore, Chicago and Denver.[9]

Following the submission of briefs by numerous carriers and local groups and three days of hearings, the ALJ issued his initial decision on September 4, 1969. The ALJ recommended that competitive nonstop authority be authorized in all four markets under consideration. With regard to the San Diego-Denver market, he adopted the Bureau of Operating Rights' forecast that there would be "not less than 100,335 passengers in 1970." Based on this "conservative" estimate he found "ample traffic to support two carriers on an economic basis without regard to the support of through traffic flowing over the route."[10] The ALJ selected Western and Continental to provide the competing nonstop service. Western was a "logic choice" because it carried the great bulk of the San Diego-Denver passengers on its one stop flights routed via Phoenix.[11] Continental was chosen ahead of United, TWA and Air West as the second carrier because of United's past "record of neglect and indifference" toward the market and because of Continental's superior proposed pattern of service; attractive fare schedules; substantial beyond market benefits; and history as "an extremely vigorous, aggressive, and efficient carrier."[12]

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[9] Order No. E-26608, April 3, 1968, at 4, JA 33.

[10] *See* Initial Decision, *supra* note 6, at 64 & n. 115, JA 435 & n. 115. The ALJ deemed the Bureau's forecast conservative because its base year traffic figures did not include "on-line connecting passengers" and its stimulation factor—growth attributed to new, improved service—did not take account of Continental's attractive fare proposals.

[11] *See id.* at 65, JA 436.

[12] *See id.* at 66-76, JA 437-47.

Continental proposed three "conveniently timed" round trips a day and offered "not only first-class and coach service, at substantial reductions in fares, but also . . . the economy service for which the carrier is well-known, at considerably reduced fare levels." In

The CAB execised its right of discretionary review of the ALJ initial decision, issuing its opinion on April 9, 1970.[13] The Board adopted the ALJ's findings regarding the need for competitive nonstop service in the Chicago, New York/Newark, and Washington/Baltimore markets but decided, by a vote of 3-2, to certificate only one nonstop carrier, Western, in the San Diego-Denver market. This departure from the ALJ's determination rested primarily on the majority's view that "the examiner's forecast may be too optimistic" given "the recent lag in nationwide traffic growth."[14] Although the CAB noted that a competitive authorization would provide a spur to better service and significant benefits to beyond segment markets, it concluded that Western's possible "sizable operating loss if competitive service is instituted" in conjunction with the adequacy of Western's proposed service to meet the needs of the market rendered a denial of a competing nonstop carrier certification "more consistent with the goal of fostering sound economic conditions in air transportation. . . ."[15] The dissenting Board members

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contrast to TWA, it offered 3-2 seating in coach and economy sections instead of less comfortable 3-3 seating. Continental's selection would also provide a substantial number of passengers in four beyond markets either first single-plane or first single-carrier service —a factor of prime importance. The ALJ considered Continental's efficiency and agressiveness important in view of Western's "long-entrenched" position in the market. Finally, in addition to service, scheduling, and beyond market advantages over TWA, Continental was given a plus as a far smaller carrier to which the award would "be more important" than to TWA. Air West was passed over because its shaky financial position made it doubtful that it could offer Western "effective, dynamic competition."

[13] *See* 14 CFR §§ 385.50-.54 (1975) (delineating the discretionary review procedure).

[14] Opinion 70-4-46, April 9, 1970, at 2, JA 39, 41.

[15] *Id.* at 4 & n. 6, JA 41 & n. 6. The Board also noted that the examiner had relied in part on Western receiving new revenue from

emphasized that the projection of 100,335 passengers (275 per day) in 1970 was "a very conservative estimate" which did not include either "true San Diego passengers (because they traveled from Los Angeles to San Diego by surface transportation or intrastate airlines) or "the substantial number of passengers carried between these points who will move beyond Denver to points on the routes of both Western and Continental."[16] In addition, the dissent noted that within the past year the Board had made grants of competitive nonstop service in a number of substantially smaller markets.[17]

A number of parties, including Continental sought reconsideration of the Board's determination. Petitioner claimed that the majority lacked substantial evidence to support its determination that the traffic forecast of the ALJ and the Bureau of Operating Rights was too optimistic. It noted that the lag in national traffic had not affected

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San Diego-New York/Newark and San Diego-Washington/Baltimore awards which the Board decided to grant to United. *Id.* at n. 7.

[16] Concurring and Dissenting Opinion of Members Murphy and Minetti in Opinion 70-4-46, at 1, JA 49.

[17] *Id.* at 1-2 & n. 1, JA 49-50 & n. 1. A partial list of such awards showing O & D plus interline connecting traffic projected for the forecast year included:

Houston-Seattle/Portland	150
Denver-San Antonio	194
Denver-Portland	220
Salt Lake City-Seattle	222
Salt Lake City-Portland	138
Houston-St. Louis	272
San Antonio-Washington	176-224
New Orleans-Tampa (3 carriers)	206
Houston-Miami	280
Dallas-Tampa	158
Albuquerque-Las Vegas	206
Albuquerque-San Francisco	190-330
Memphis-New Orleans	246

the market at issue—the San Diego-Denver market had grown 34% between 1967 and 1968 and both San Diego and Denver experienced an increase in total traffic well in excess of the national average. Continental reinforced its argument by pointing out that the traffic estimates of three other carriers paralleled or exceeded the ALJ's forecast and the ALJ's figure was significantly understated because of the factors noted by the dissenting members.[18]

The CAB, by order of June 5, 1970, deferred action on the petitions to reconsider certification of a second nonstop carrier between San Diego and Denver. In its Supplemental Opinion and Order on Reconsideration of March 23, 1971, the Board, by an identical 3-2 vote, reaffirmed its previous denial of competitive service. The majority conceded that the San Diego-Denver market "maintained a healthy growth rate in calendar year 1968," but argued that 1969 traffic data demonstrated that "the market is by no means an exception to the nationwide slowdown."[19] Using more recent traffic figures and a 1971 forecast year, the majority calculated that "Continental certification would produce an operating loss of about $84,000 for Western in 1971. . . ." The Board concluded that harm to Western "at a difficult period for the industry as a whole and Western in particular" outweighed the "significant

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[18] Petition of Continental Air Lines, Inc., for Reconsideration of Order 70-4-46, May 4, 1970, at 2, 5-6, JA 211, 214-15.

Party	Annual	Daily
Air West	98,870	271
Continental	101,222	277
TWA	117,240	320
Western	94,216	258
Bureau	100,335	275

Since Western's forecast assumed monopoly service, it would have to be increased to obtain an estimate for the size of a competitive market.

[19] Order 71-3-135, March 23, 1971, at 2, JA 68.

factors" favoring certification such as substantial beyond segment benefits and profitable operation for Continental.[20] The dissenters claimed that "[t]here can be no serious question . . . that this market is large enough to support competition," emphasizing that the majority projection for 1971 yielded a larger traffic volume than the ALJ had found sufficient to support competition using a 1970 target year.[21] They found that the possibility of a temporary loss by Western in 1971 was overshadowed by public benefits from improved service which Continental's competitive flights would provide in the San Diego-Denver market and in other related markets.[22]

Shortly after issuance of its supplemental opinion, the Board discovered that its financial calculations had erroneously rested on fiscal rather than calendar 1971 traffic estimates and consequently had underforecast 1971 traffic volume. Corrected estimates revealed that, in competition with Continental, Western's 1971 profits would range from slightly below to somewhat above the break-even level. The CAB stated: "These revised figures render extremely close the balance of decisional criteria—harm to Western under existing economic conditions weighed against public benefit factors favoring competition and improved beyond service—in determining whether such competition should be authorized." Under these circumstances, the Board, by order of April 16, 1971, remanded the competi-

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[20] *Id.* at 4-5, JA 70-71.

[21] Dissenting Opinion of Members Murphy and Minetti in Order 71-3-135, at 1, JA 72. The majority forecasted 103,124 passengers in 1971 as compared with the ALJ's 1970 forecast of 100,335. *See* Order 71-3-135, March 23, 1971, Appendix A, at 2, JA 78.

[22] Dissenting Opinion, *supra* note 21, at 4, JA 75. The dissenters also challenged the majority's loss projection on the basis of its underestimation of passengers by ignoring surface and intrastate Los Angeles-San Diego traffic and using atypical 1969 growth rate figures and its overestimation of costs.

tion question to the ALJ for an analysis of "the most recent traffic and cost data and Western's actual experience with nonstop service in the market." [23]

The remand proceeding culminated in a 92-page Supplemental Initial Decision issued on March 20, 1972. The decision found a second nonstop carrier warranted by the size of the market in the 1972 and 1973 forecast years, the serious deficiencies and omissions in Western's service, and Western's ability "to achieve a substantial operating profit" in each of the forecast years in competition with another nonstop carrier.[24] The ALJ accepted as reasonable the Bureau of Operating Right's traffic estimate of 118,520 passengers in 1972 and 127,409 in 1973 and its related projection of an operating profit for Western of $417,000 in 1972 and $325,000 in 1973.[25] The supplemental decision faulted Western's San Diego-Denver service for scheduling inadequacies and high load factors.[26] The ALJ selected Continental to compete with Western for substantially the same reasons contained in his initial decision.[27]

The Board, 3-2, again reversed the ALJ and declined to authorize competitive nonstop service. The majority

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[23] Order of Remand, Order 71-4-112, April 16, 1971, at 1, JA 79.

[24] Supplemental Initial Decision of Hyman Goldberg, Hearing Examiner, March 20, 1972, at 55, JA 585.

[25] *Id.* at 56, 75, JA 586, 605.

[26] *See id.* at 59-65, JA 589-95. Among the "many serious inadequacies" were findings that the carrier did not provide prime time departures in both directions, that there were significant service gaps, that Western served the market only as part of long-haul flights, and that load factors indicated "unresponsive scheduling on Western's part." Although Western had proposed to provide three nonstop round trips, it had never flown more than two daily nonstop round trips.

[27] *See id.* at 77, JA 607-17; note 12 *supra*.

members expressed concern that, "during a period of lagging traffic growth and retrenchment within the industry, and during the subsequent period of recovery before an adequate upward trend has been assured," the agency "must be more than usually careful to avoid impeding the industry's opportunities for full recovery." [28] It concluded that certification of competition would be imprudent since Western's service had been "reasonably responsive to the needs of the market" and since competitive service was "likely to produce, at best, only marginal financial results." [29] The Board found the ALJ's and the Bureau's traffic forecast "too optimistic" and set forth a number of adjustments in their growth and stimulation percentages which reduced the 1973 traffic estimates by 29,000 passengers.[30] Although the Board made no profit or loss calculations of its own, it concluded that "the prospect for profitable two-carrier operation is tenuous at this time." [31]

Continental's detailed petition for reconsideration took issue *inter alia* with the Board's adjustments to the ALJ's traffic forecast. In particular, it questioned the majority members' reliance on experience during recession years to support its forecast of a 3 percent growth rate for 1972 and 1973, in view of the Board's earlier finding that the recession was a "temporary phenomenon." [32] As proof of the Board's error, Continental noted that, as a result of substantial growth, Western's traffic figures revealed that the market was significantly larger at the end of

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[28] Opinion 72-12-29, December 8, 1972, at 2, JA 85.

[29] *See id.* at 3, JA 86.

[30] *See id.* at 8-10, JA 91-93.

[31] *Id.* at 8, JA 91.

[32] Petition of Continental Air Lines, Inc. for Reconsideration of Order 72-12-29, January 29, 1973, at 20, JA 313, *quoting* Domestic Passenger Fare Investigation, Order 71-4-54, at 28.

1972 than the Board had predicted it would be a year later.[33]

On May 3, 1974, fifteen months after the opinion following the remand, the Board issued an Opinion and Order on Reconsideration reaffirming, by a 2-1 vote, its denial of a competitive nonstop certification. This final opinion in these extended proceedings reiterates the Board's "policy of caution" and expresses its "resolve to avoid making unnecessary awards of competitive authority on routes which are adequately served.[34] Noting recent traffic growth data, the Board conceded "that the prospects for profitable competitive operations are far stronger than earlier believed" and that "competitive service would be more profitable than originally anticipated—although not as profitable as Continental claims." [35] However, without further explication, it stated that "the Board's original decision did not turn on profitability alone. . . ." [36] Despite the improved financial outlook for competition and the benefits it offered, the Board determined that, given the general state of the industry and the recent onset of the fuel shortage, "a competitive authorization is unnecessary and undesirable at this time." [37]

The dissenting member emphasized that traffic data indicated that the ALJ's 1973 forecasts "were on sound ground, indeed if anything conservative" and that there would likely be "well over 150,000 annual passengers" for fiscal 1975, the earliest possible first year of competitive operations.[38] He commented: "Overall, it is hard to

[33] Petition, *supra note* 32, at 20, JA 313.

[34] Opinion and Order on Reconsideration, Order 74-5-17, May 3, 1974, at 2, JA 101.

[35] *Id.* at 3, 13, JA 102, 112.

[36] *Id.* at 3, JA 102.

[37] *Id.* at 8, JA 107.

[38] Dissent of Member Minetti in Order 74-5-17, at 2, JA 121.

avoid the impression that the majority is not really interested in whether competitive service would be profitable, and has effectively eliminated this as a decisional factor." [39] Nor did he find any warrant for a denial of competitive service in the fuel situation. In view of Western's scheduled four and a half nonstop roundtrips, the dissent noted that "competitive service in this market is possible today without materially increasing overall jet fuel consumption or reducing service in other, perhaps more essential markets." [40]

On June 25, 1974, Continental filed a petition for review of the Board's 1972 order and its 1974 order on reconsideration.[41]

II. *Competition and the Public Interest Standard of the Federal Aviation Act*

Continental urges that the challenged orders must be set aside in part because the Board failed to give adequate weight to the governing statute's mandate favoring competition.[42] Petitioner's contention rests both on an as-

[39] *Id.* at 3 n. 4, JA 122 n. 4.

[40] *Id.* at 4-5, JA 123-24.

[41] The following carriers and local representatives intervened in the action: Western Air Lines, Inc., Hughes Air Corp. d/b/a Hughes Air West, United Air Lines, Inc., Trans World Airlines, Inc., City of Kansas City, Missouri and Chamber of Commerce of Greater Kansas City, City and County of Denver, Colorado, Public Utilities Commission of the State of Colorado, San Diego Unified Port District, The City of San Diego, and the San Diego Chamber of Commerce. Western filed a brief in support of the CAB and the local interests filed briefs urging competitive service. The court granted leave to the Department of Justice to file an *amicus* brief. *Amicus* supported petitioner's challenge to the CAB's order.

[42] Brief for Petitioner at 18-31. Petitioner also argued that the Board's orders must be set aside for failure to engage in reasoned decisionmaking. *Id.* at 3-48. We believe that this case is most naturally treated as presenting a question of the existence of sub-

sessment of the general importance of competition in the statutory scheme and an analysis of the Board's treatment of the record in view of that scheme. As shall be seen, these two aspects of petitioner's argument implicate distinct questions of statutory interpretation and substantial evidence. We turn first to an examination of the role of competition, in order to develop a framework for evaluating the record to determine whether the Board's decision is supported by substantial evidence and evinces a "fidelity to the functions assigned to the regulatory agency by the Congress." [43]

"Competition to the extent necessary" is one of the six public interest factors set forth in § 102 of the Federal Aviation Act to guide the CAB "[i]n the exercise and performance of its powers and duties." [44] The parties present divergent interpretations of § 102 and its competition subsection, § 102(d). Continental contends that the Act creates "a 'strong presumption' in favor of competition." [45] The CAB's brief argues that the statute "contemplates that competition may or may not be 'necessary' " and that competition is not *per se* favored "where it endangers other policy goals in the public interest, such as the achievement of efficient, economical service or the fostering of sound economy of operations." [46] Intervenor Western opines that in view of the origin of the Act "it is apparent Congress contemplated that as to Section

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stantial evidence to support the CAB's rejection of the statutory interest in the promotion of competition.

[43] *See Public Service Comm'n, State of N. Y. v. FPC (Texas Gulf Coast Area Rate Cases)*, 159 U.S.App.D.C. 172, 208-09, 487 F.2d 1043, 1079-80 (1973), *vacated and remanded sub nom. Shell Oil Co. v. Public Service Comm'n*, 417 U.S. 964, 94 S.Ct. 3166, 41 L.Ed.2d 1136 (1974).

[44] Section 102 is set forth at note 4 *supra*.

[45] Reply Brief for Petitioner at 2.

[46] Brief for Respondent at 20, 22.

102(d) the emphasis would be, not on the word 'competition,' but on the remainder of the phrase: to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." [47] An examination of the origins of the statute and of its "contemporaneous construction" by persons "charged with the responsibility of setting its machinery in motion" [48] clarifies the intended meaning of § 102(d) and the relationship between competition and the other public interest factors.

Congress first established a comprehensive system for regulation of air transportation through the Civil Aeronautics Act of 1938.[49] The legislative history of that act makes clear that the statute was designed to correct the abuses of unrestrained competition among carriers. The Senate Report on the proposed legislation warned that "[c]ompetition among air carriers is being carried to an extreme, which tends to jeopardize and render unsafe" air transportation and urged the "immediate enactment" of the bill to "promote an orderly development of our Nation's civil aeronautics" and to "prevent the spread of bad practices and of destructive and wasteful tactics resulting from the intense competition now existing within the air-carrier industry." [50] In floor debates, Congressman Randolph cited "rate war, cutthroat devices, and destruc-

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[47] Brief for Intervenor Western Air Lines at 30.

[48] *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924 (1961), *quoting Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 77 L.Ed. 796 (1933).

[49] 52 Stat. 973 (1938).

[50] *S.Rep.No.* 1661, 75th Cong., 3d Sess. 2 (1938); *see H.R.Rep.No.* 911, 75th Cong., 1st Sess. 19 (1937).

tive and wasteful practices" as evidence that "[t]he industry has reached the point where unbridled and unregulated competition is a public menace."[51]

However, Congress made it clear that while it was moving to safeguard against the excesses of destructive and unrestrained competition, it was in favor of the competitive principle and opposed to a policy of monopoly. In the debates, Senator McCarran stressed that the Act established a "nonpolitical agency" that would focus on the public interest of avoiding destructive competition where *e. g.*, United Air Lines already serves Chicago to Salt Lake City, and the agency rejects another applicant who wants to serve the route, "because if you do both lines will fail. . . ." He added:

> [This] is not to say that any line may be "frozen" nor that any line may be perpetuated, nor that any monopoly over any terrain may be established to the exclusion of the necessity which the public may present.[52]

Other speakers likewise evinced a clear intent to protect against the evils of monopoly. Senator Borah, for example, stated: "I have no doubt of the intent of the framers of this proposed legislation to inhibit or prohibit monopoly. . . ."[53] And Senator Copeland, Chairman of the pertinent committee, pointed to the "competition to the extent necessary" language in the declaration of policy section—§ 2 of the 1938 Act which was reenacted in 1958 as § 102 of the Federal Aviation Act—as one of "five places in the pending bill where the question of monopoly is dealt with in one way or another with the view to its control and prevention."[54]

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[51] 83 *Cong.Rec.* 6507 (1938).

[52] 83 *Cong. Rec.* 6852 (1938). Senator McCarran was the author of the original Senate bill.

[53] 83 *Cong.Rec.* 6730 (1938).

[54] *Id.* Senator Copeland was chairman of the Senate Commerce Committee which conducted the hearings on the bill.

The central point is that this was one of an emerging group of statutes that did not regulate the so-called "natural monopolies" that identified conventional public utility regulation, but instead called for "regulated competition," achieving the benefits of competition without the evils of unrestrained entry or under-cost rate wars.

It is significant that Congress, addressing itself to the air transport industry, deliberately fashioned this 1938 law so as to identify competition in express language as a key element of the public interest. During the Senate debate it was emphasized that both of the 1938 bills—the McCarran bill and the Administration substitute—altered the general declaration of policy contained in earlier bills to take "explicit recognition of the importance of competition to the extent necessary to assure the sound development of air transport."[55]

Numerous early CAB opinions provide insight into the intended role of competition in the new regulatory scheme. In one of its first decisions the Board stated: "Reference to both the legislative history and to the text of the act demonstrates the congressional intent to safeguard an industry of vital importance to the commercial and defense interests of the Nation against the evils of unrestrained competition on the one hand, and the consequences of monopolistic control on the other."[56] The CAB read the inclusion of an express reference to competition in § 2 to render inapplicable doctrine developed under other transportation regulatory schemes that competition should not be authorized where an existing carrier was furnishing adequate service and stood ready to meet any additional

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[55] 83 *Cong.Rec.* 6726 (1938) (comparison of bills submitted by Senator Truman).

[56] *Acquisition of Western Air Express Corp.*, 1 CAA 739, 749-50 (1940) (a § 408 case), *cited with approval in Additional North-South California Services Case*, 4 CAB 373, 374 (1943) (interpreting § 2 in a route award proceeding).

service needs of the public.[57] The Board stated explicitly that when "competition will be neither destructive nor uneconomical . . . the Board is directed to implement competition" because it generally promotes the other public interest factors set forth in § 2.[58] Thus the CAB concluded in the *Additional North-South California Service Case:*

> While no convenient formula of general applicability may be available as a substitute for the Board's discretionary judgment it would seem to be a sound principle that, since competition in itself presents an incentive to improved service and technological development, there would be a strong, although not conclusive, presumption in favor of competition on any route which offered sufficient traffic to support competing services without unreasonable increase of total operating cost.[59]

[57] *See American Export Airlines, Inc.*, 2 CAB 16, 29-31 (1940). Subsequent CAB decisions have firmly established that, in considering the extent to which competition is necessary to the sound development of the air transportation system, the Board "has not been guided by the negative concept of determining first whether the existing services met minimum standards of legal adequacy." *Southwest Northeast Service Case*, 22 CAB 52, 60 (1955). Although inadequacy of existing service is a factor to be weighed heavily in assessing the need for a competitive spur, the presence of adequate service by a monopoly carrier does not supplant the statutory recognition of the desirability of competition. *See, e. g.*, Domestic Passenger-Fare Investigation, Order 71-4-54, April 9, 1971, at 27 ("We have stated that major markets require competition regardless of the quality or quantity of service provided by monopoly carriers."); *Syracuse-New York City Case*, 24 CAB 770, 790 (1957) ("as to the principal criteria for authorizing competing service: the size, importance, and potential are the prevailing factors—not adequacy of service"); *Hawaiian Case*, 7 CAB 83, 103 (1946); *Additional North-South California Services Case*, 4 CAB 373, 375 (1943).

[58] *See, e. g.*, Domestic Passenger-Fare Investigation, Order 71-4-54, April 9, 1971, at 27; *Seaboard & Western Airlines, Inc., Mail Authorization*, 29 CAB 49, 85 (1959); *Southern Service to the West Case, Reopened*, 18 CAB 790, 799-800 (1954); *Trans-Pacific Airlines, Ltd.*, 12 CAB 900, 901 (1951); *IATA Agency Resolutions Proceeding*, 12 CAB 493, 509 (1951); *Colonial Airlines, Inc., et al., Atlantic Seaboard Operation*, 4 CAB 552, 555 (1944).

[59] 4 CAB 373, 375 (1943).

And it further explained in the *Hawaiian Case*:

> The greatest gain from competition . . . is the stimulus to devise and experiment with new operating techniques and new equipment, to develop new means of acquiring and promoting business, including the rendering of better service to the customer and the Nation. . . . Competition invites comparison as to equipment, costs, personnel, methods of operation, solicitation of traffic, all of which tend to assure the development of an air transportation system as contemplated by the Act.[60]

The legislative history and the early CAB decisions indicate that there is no presumption in favor of competition *per se* because competition may prove uneconomical and destructive of the healthy development of the industry if the relevant market is too small to support competing carriers. But when sufficient traffic exists to support competition, certification of competing carriers is mandated by the Act as providing the best means of effectuating the other public interest goals contained in § 102.[61]

[60] 7 CAB 83 103-04 (1946).

[61] The CAB has repeatedly noted the unique advantages to improved service offered by competition. *See, e. g., North Atlantic Route Case*, 6 CAB 319, 326 (1945) ("No effective substitute for healthy competition as a stimulus to progress and efficiency can be found in monopoly."); *Colonial Airlines, Inc., et al., Atlantic Seaboard Operations*, 4 CAB 552, 555 (1944) ("The improvements which flow from competitive service cannot be obtained by administrative fiat. There is no regulation conceivable which could assure courtesy by a carrier's employees, for example, and it would be extremely difficult to attempt to dictate many other matters affecting the quality of service rendered."). In the present proceeding, the Board noted that "competition ultimately holds the greatest potential for vigorous development of air transportation." Order 72-12-29 at 3, JA 86.

We place substantial reliance on this view of the role of competition both because of the particular respect due a "contemporaneous construction of a statute by men charged with the responsibility of setting its machinery in motion" [62] and because the Board "has from the outset consistently taken" that position.[63] Although Continental and the Department of Justice, as *amicus curiae*, charge that this case is indicative of the Board's recent unannounced abandonment of this view and adoption of a route freeze policy,[64] we need not address that claim in view of the Board's failure to articulate its actions as a fundamental change in policy. "In our reviewing role, it is peculiarly appropriate for us to take the Board at its own word as to what it was doing, and to scrutinize the result in terms of that process." [65] We thus proceed to an examination of the Board's treatment of the record to determine whether there is substantial evidence indicating either that the San Diego-Denver market lacks sufficient traffic potential for healthy competition or that another

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[62] *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961), *quoting Norwegian Products Co.* v. *United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 77 L.Ed. 796 (1933); *see NRDC v. Train*, —— U.S.App.D.C. ——, ——, 510 F.2d 692, 706 (1974).

[63] *Trans-Pacific Airlines, Ltd.*, 12 CAB 900, 901 (1951); *see* Southern Tier Competitive Nonstop Investigation, Order 69-7-135, July 24, 1969, *quoted in Continental Air Lines, Inc.* v. *CAB*, 143 U.S.App.D.C. 330, 338, 443 F.2d 745, 753 (1971) ("The Board has always taken the view that competition in markets which can sustain it is the best guarantee of good service to the traveling public."); Domestic Passenger-Fare Investigation, Order 71-4-54, April 9, 1971, at 27 ("One of our principal policies has been that the traveling public is entitled to the benefit of competition whenever it is justified by existing and projected market traffc.).

[64] *See* Reply Brief for Petitioners at 13-16; Brief for United States as *Amicus Curiae* at 31-34.

[65] *Continental Air Lines, Inc., supra note* 63, at 341, 443 F.2d at 756.

public interest consideration outweighs the significant benefits afforded by competition.[66]

III. *Lack of Substantial Evidence to Support Rejection of Competition*

The post-remand orders under review in this case set forth two justifications for rejecting the ALJ's recommendation that competitive nonstop service be certificated for the San Diego-Denver market—maintenance of the economic health of the industry and the fuel shortage. Although a comprehensive analysis would pinpoint a number of shortcomings in the CAB's opinions, we find that a focused examination of the evidence supporting these two core rationales is entirely sufficient to demonstrate the lack of substantial evidence to underpin the Board's rejection of competition.

A. *Promotion of Sound Economic Conditions*

In its initial orders culminating in a remand for further proceedings on the issue of competitive nonstop service, the Board concentrated on the economic threat to Western posed by authorization of a competing carrier. Although the ALJ had found that the market would be large enough to support competition in 1970, the initial forecast year, the Board concluded that the projection was too optimistic "[i]n view of the recent lag in nationwide traffic growth"

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[66] The CAB's counsel at oral argument on appeal stated that the Board recognized "the prime value of competition" and asserted that "the Board's interpretation of the statute would be that competition would be mandated" where two carriers could achieve a profit and a reasonable return and absorb the new route without adverse impact on their system-wide operations. Accordingly, Board counsel stated that "the question would turn on the evidence in the record as to the projections going to traffic growth and the projections going to revenues that would be received if competition were instituted."

and credited Western's "gloomy forecast" of "a sizeable operating loss if competitive nonstop service is instituted."[67] When Continental petitioned for reconsideration on the basis that the record showed substantial growth in the San Diego-Denver market contrary to the national trend, the Board responded that "more recent O & D data demonstrates [sic] that the market is by no means an exception to the nationwide slowdown."[68] The CAB went on to project an $84,000 operating loss for Western in 1971 under competition with Continental and to conclude that "Continental's advantages" were outweighed "by the harm the carrier would cause to Western's operations . . . at a difficult period for the industry as a whole and for Western in particular."[69] When discovery of an error erased the $84,000 loss projection, the Board altered its analysis of the competition issue. It remanded the question for further proceedings, stating that "[t]hese revised figures render extremely close the balance of decisional criteria—harm to Western under existing economic conditions weighed against public benefit factors favoring competition and improved beyond service. . . ."[70]

Significantly, by the time of the last CAB order in May, 1974, the Board had abandoned its reliance on the threat of competition to the profitability of Western's San Diego-Denver service. The ALJ and the CAB's Bureau of Operating Rights again found that there would be substantial growth in the market in both the 1972 and 1973 forecast

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[67] Opinion 70-4-46, April 9, 1970, at 4, JA 41.

[68] Order 71-3-135, March 23, 1971, at 2, JA 68.

[69] *Id.* at 4-5, JA 70-71. The Board relied solely on 1969 growth figures in projecting 1971 traffic. The CAB did not distinguish earlier decisions refusing to base determinations on short-term, recession traffic data. *See New York-San Francisco Nonstop Service Case*, 29 CAB 811, 815 (1959).

[70] Order 71-4-112, April 16, 1971, at 1, JA 79.

years and projected that both Western and Continental would achieve sizeable profits in each of those years.[71] The Board again deemed the ALJ and Bureau of Operating Rights' traffic forecast "too optimistic," making numerous downward revisions in the ALJ's forecasting assumptions and concluding that the competitive service was "likely to produce, at best, only marginal financial results."[72] In contrast to its pre-remand orders, the Board did not make the key bottom line profit and loss calculation in its 1972 order or include any reference to the financial status of Western and Continental. Implicit in the Board's decision was its belief that any doubts as to the profitability of competition should be resolved against certification of a second carrier "to avoid impeding the industry's opportunities for full recovery."[73]

The CAB argues that its analysis of traffic projections and balancing of public interest factors involve a "specialized task" that is "within the Board's special province" and that the court should defer to the agency's

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[71] *See* text accompanying notes 24-25 *supra*.

[72] Opinion 72-12-29, December 8, 1972, at 3, 8-12, JA 86, 91-95. The Bureau's forecast had used a 7.5% annual growth rate, a 15% stimulation figure, and estimated that 30% of the San Diego-Twin cities traffic would travel on Western via Denver. Using 1968-71 figures, and discounting for presumed stimulation from Western's commencement of nonstop flights, the Board selected a 3% growth rate for 1972 and 1973. Yet, at the time the Board adopted its 3% figure based on recession experience, it had Western's projection of a 10% growth rate and Western's traffic data through April, 1972, showing a 12% increase for the first four months of 1972 over the first four months of 1971. *See* Brief for Petitioner at 39-40. The Board also failed to note or to explain adequately the result that its 1973 forecast of 98,409 (the ALJ's forecast of 127,409 minus the reduction of 29,000 passengers resulting from the Board's adjustments; JA 93) was substantially lower than its corrected projection of 106,851 passengers for 1971.

[73] Opinion 72-12-29, at 2, JA 85.

expertise in these technical matters.[74] In response, Continental identifies a number of danger signals that serve to alert the court to the Board's failure to engage in a reasoned application of its expertise—a predicate to restrained and deferential judicial review of an agency's actions.[75] It points to the ever-shifting basis of the Board's decisions, the inexplicable delay in preparation of agency orders, and the persistent conservative downgrading of the ALJ's and staff's traffic forecasts in the teeth of data revealing significant growth as danger signals indicating that the Board's adjustments and conclusions are a product of "result-oriented" rationalization.[76]

We are not required to rule on this contention, to evaluate the strength of these danger signals or to consider whether they undercut the deference normally accorded to agency analyses of technical traffic matters. These matters have been obviated by the Board's May, 1974 Opinion and Order on Reconsideration, which concedes the need for adjustment of its forecast and states that competition would be profitable.[77] Subsequent additions to the traffic data that were before the Board prior to its 1972 order convincingly demonstrated that the majority members severely underestimated the size of the market.[78] Faced with these figures, the Board acknowledged what could not fairly be denied—"the prospects for profitable competitive

[74] Brief for Respondent at 22, 38-39.

[75] *See Greater Boston Television Corp.* v. *FCC*, 143 U.S.App.D.C. 383, 393, 444 F.2d 841, 851 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971).

[76] *See* Brief for Petitioner at 16-18, 47-49.

[77] *See* Order 74-5-17, May 3, 1974, at 3, 10, 13, JA 102, 109, 112.

[78] Continental's petition for reconsideration pointed to Western's traffic data showing a 23.9% growth in the market during the first eleven months of 1972 over the same period in 1971. *See* Petition of Continental Air Lines, Inc. for Reconsideration of Order 72-12-29, January 29, 1973, Appendix 10, at 1, JA 329.

operations are far stronger than earlier believed" and "competitive service would be more profitable than originally anticipated."[79]

But then the Board brushed these developments aside, stating that its "original decision did not turn on profitability alone. . . ."[80] Since the profitability of Western was the crucial reason for the original remand, we do not see how this fairly could be discarded without explication of why the change in this factor did not alter the conclusion.[81] The only factor identified in the Board's April, 1971 order authorizing the remand of the competition question was profitability—"harm to Western under existing economic conditions. . . ."[82] The March, 1971 Supplemental Opinion and Order on Reconsideration had pointed to the related factor of "a difficult period . . . for Western in particular," but by May, 1974, Western's financial situation had brightened with earnings in excess of the 12% level found "reasonable" by the Board in its Domestic Passenger-Fare Investigation.[83]

The only remaining factor mentioned in the CAB's prior decision in this matter was the financial condition of the industry as a whole. But that consideration had been relied upon solely in terms of justifying a "more than usually careful" approach to evaluating the competition question in the San Diego-Denver market. That approach may have validity, if not carried to extremes, for it still leads

[79] Order 74-5-17, May 3, 1974, at 3, 13, JA 102, 112.

[80] *Id.* at 3, JA 102.

[81] *See Greater Boston Television Corp.* v. *FCC*, *supra* note 5, at 394, 44 F.2d at 852.

[82] Order 71-4-112, April 16, 1971, at 1, JA 79.

[83] *See* Domestic Passenger-Fare Investigation, Order 71-4-58, April 9, 1971, at 2. Western's 1973 rate of return was 12.3% and its profit for the fiscal year ending March 31, 1974 was 14.1%. *See* Brief for Petitioner at 15.

up to an ultimate decision focused on the subject market. But we are unable to discern on what basis the Board can glean any support from this factor of general conditions once it has recognized, as it now apparently has, that the particular market will sustain competition and still be profitable. If an air transport market is substantial and thriving, we do not see how the fact that other markets are over-served, can justify leaving this market under-served, or depriving it of the public-interest benefits of competition.

Is the Board obliquely saying that monopoly profits are needed in this market to sustain overall industry earnings when shaky?

This would not only raise serious questions of Congressional intent, and adequacy of articulation of reasoning, but present the question whether there is evidence to show that competition in this market will not maintain overall profits,[84] by enhancing efficiency, quality of service, and the size of this and connecting-beyond markets.[85] In the end we are left with the conviction that the Board's reference to general industry conditions is "local color"

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[84] Under previous Board opinions, the important issue is not maintenance of existing profit levels but the more fundamental concern that carriers derive some profit from the market. *See* Southern Tier Competitive Nonstop Investigation, Order 73-2-89, February 23, 1973, at 7-8 (The Board noted that, once applicants "can be expected with reasonable assurance to operate their proposals at a profit," "[t]he relative profitability of their various operations is therefore not nearly as important a decisional factor as the public benefits they can provide."). In the present case, the ALJ noted that the Board "traditionally does not look beyond the estimated operating profit or loss on a proposed operation" to consider rate of return. Supplemental Initial Decision, *supra* note 24, at 80 n. 140, JA 610 n. 140.

[85] The Board in 1971 had viewed the prospect of new profitable operation by Continental in the instant and connecting beyond segments as a "significant" positive factor. *See* Order 71-3-135, March 23, 1971, at 4, JA 70.

to gain an atmosphere of acceptability for the result, rather than a novel, independent ground of decision resting on substantial evidence.

We have not ignored the passage, in the Board's opinion denying reconsideration, which says that the industry's faltering in its effort to achieve recovery "fortifies our resolve to avoid making unnecessary awards of competitive authority on routes that are adequately served."[86] The structure of this sentence suggests that the general faltering of industry factor (which we have already discussed and found wanting) was taken in conjunction with, and as fortifying, a separate regulatory notion that competition is "unnecessary" when existing (monopoly) service is "adequate." Such a concept would not only constitute a fundamental change in doctrine that requires a more direct address and reasoned analysis than this elliptical reference[87] but more important would conciet with the intent of Congress as we discern it.[88]

B. *The Fuel Shortage*

We come, finally, to the fuel shortage issue to which the Board referred in ultimately denying reconsideration. The onset of the oil embargo in late 1973 diminished the fuel supplies available for air transportation. The Board's May, 1974 opinion grasped the fuel problem as an independent reason for rejecting competitive service.[89] As the

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[86] Order 74-5-17, May 3, 1974, at 2, JA 101.

[87] *See Greater Boston Television Corp. v. FCC*, *supra* note 75, at 394, 44 F.2d at 852; *Northeast Airlines, Inc.* v. *CAB*, 331 F.2d 579, 589 (1st Cir. 1964) (Aldrich, J., concurring).

[88] We approve the initial construction of the Act adopted by the Board concerning the relevance of the monopolist's service to the need for competition. *See* text accompanying note 57 and note 57 *supra*.

[89] *See* Order 74-5-17, May 3, 1974, at 1-2, 13, JA 100-01, 112; Brief for Respondent in No. 74-1664, *Eastern Air Lines, Inc.* v. *CAB*, at 24.

Justice Department brief remarks, since fuel shortages are a permanent fixture of American life, this is tantamount to writing § 102(d) out of the Act.[90] Moreover, the Justice Department aptly comments that there is no support for the Board's alleged fear that certificating competitive service would increase fuel consumption at the expense of more "essential service elsewhere" to the "overall" detriment of the public interest."[91] The crisis of late 1973 may have justified temporary orders to preserve the status quo pending analysis, but not an indefinite abdication by CAB.[92] We have recently noted in another context that the existence of an energy crisis does not excuse a regulatory agency's "failure to seek answers" pertinent to the exercise of its duties or its "abdication of its duty to 'indicate fully and carefully the methods by which, and the purposes for which, it has chosen to act.'"[93]

The CAB contends that its reference to the Remanded Atlanta/Detroit/Cleveland/Cincinnati Investigation was sufficient since "there was no reason for the Board to repeat in this case what it had already said in a companion case issued on the same day."[94] However, in the companion case the Board found that the proposed competitive flights "would consume well over 10 million gallons of fuel annually." In addition, it noted that the markets under consideration there were experiencing load factors "only moderately if at all above the Board's rate-making

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[90] Brief for United States as *Amicus Curiae* at 31 n. 16.

[91] *Id.* at 30; Dissent of Member Minetti on Order 74-5-17, May 3, 1974, at 4-5, JA 123-24.

[92] *See United States v. CAB*, —— U.S.App.D.C. ——, ——, 511 F.2d 1315, 1325-27.

[93] *See Public Service Comm'n v. FPC*, —— U.S.App.D.C. ——, ——, 511 F.2d 338, 346 (1975).

[94] Brief for Respondent at 36.

standard of 55 percent."[95] Here, by contrast, additional fuel was not required to institute competition. At the time of the final order, Western was planning to run four and a half nonstop trips in the San Diego-Denver market. This exceeded the two round trip flights each which the carriers had proposed to institute in the remand proceedings.[96] Moreover, the monthly on board coach load factors on Western's San Diego-Denver flights were repeatedly well in excess of the 55% level during the 14 months ending with July, 1973.[97] In this context, the Board's bare reference to the fuel shortage rationale set forth in the Atlanta-Detroit case is not sufficient to constitute reasoned decision-making for the disparate conditions of the San Diego-Denver market.

Section 102 sets forth six public interest factors to guide the CAB in the exercise of its statutory duties. We are cognizant that in reviewing agency orders "[t]he court's responsibility is not to supplant the [Board's] balance of of these interests with one more nearly to its liking,"[98] but the state of the record establishes that the Board recited the public benefits to be derived from competition, and did not itself accord them any real weight in the balance, dismissing them, in effect, as overborne by considerations, of the health of the industry and the fuel sit-

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[95] Opinion 74-5-18, May 3, 1974, at 4 & n. 6, JA 129 & n. 6.

[96] *See* Supplemental Initial Decision, *supra* note 24, at 28, 43 n. 9, JA 558, 573 n. 91.

[97] *See* Order 74-5-17, May 3, 1974, at Appendix A, JA 115 (6 months with load factors in excess of 60% and 3 additional months with load factors in excess of 70%).

We express no opinion on the merits of the petition to review the companion case relied on by the CAB in the instant proceeding. That case pending in this court, *Eastern Air Lines, Inc. v. CAB, No. 74-1664* (D.C.Cir., filed June 28, 1974).

[98] *See Permian Basin Area Rate Cases*, 390 U.S. 747, 792, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968).

uation, which lacked any support in substantial evidence. Accordingly, the challenged orders are set aside and the record is remanded for further proceedings.

IV. *Remand Proceedings*

The agency proceedings eventuating in Continental's petition for review were commenced over 8½ years ago. Two complete evidentiary hearings have been conducted and the ALJ has issued two thorough initial decisions detailing the characteristics of the market, analyzing traffic forecasts, and compairing the strengths of carriers seeking certification. The record before us contains ample evidence of the need for competing nonstop service. We agree with Intervenor Western Air Lines that "[p]ublic policy dictates that the case be brought to an end."[99] We thus contemplate that the CAB will proceed expeditiously on remand with selection of a competing nonstop carrier. To avoid any unnecessary delay, we note that if the Board should invoke the procedure of petitioning this court to modify its mandate to permit taking of additional evidence on the pendency of this appeal, it should set forth with particularity the matters involved and their relationship to the desirability and feasibility of implementing competition.

Turning finally to the question of carrier selection, we note that this issue has also been fully fleshed out in the previous hearings. The ALJ has twice selected Continental over the other carriers seeking nonstop authorization to compete with Western. The Board has repeatedly noted the substantial beyond market benefits offered by Continental and has spoken in terms of the advantages provided by Continental in addressing the related competition question. Nonetheless, as Intervenor United Air Lines, points out, the Board has not squarely examined the ALJ's findings on the carrier selection issue. On remand the CAB

[99] Brief for Intervenor Western Air Lines at 25.

should review the record and render a supplemental order either adopting the ALJ's determination or setting forth its separate reasons for accepting or rejecting the ALJ's selection. In view of the comprehensive record before the agency and the public interest in a prompt determination, we trust that the Board will proceed with expedition in completing carrier selection.

The case is remanded for further proceedings in accordance with this opinion.

So ordered.

APPENDIX B

Federal Aviation Act of 1958
[49 U.S.C. § 1302, § 1371, § 1486, and 5 U.S.C. § 706]

DECLARATION OF POLICY: THE BOARD

Sec. 102 [49 U.S.C. Code 1302]. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation, by air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

CERTIFICATE REQUIRED

Sec. 401 [49 U.S. Code 1371]. (a) No air carrier shall engage in any transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

ISSUANCE OF CERTIFICATE

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the application is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition or limitation found by the Board to have been violated. Any interested

person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

JUDICIAL REVIEW OF ORDERS

Orders of Board and Administrator Subject to Review

Sec. 1006 [49 U.S. Code 1486]. (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States of the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of the court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Notice to Board or Administrator; Filing of Transcript

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. [Subsection (c) as amended by Public Law 86-546, 86th Congress, 2d Session, approved June 29, 1960, 74 Stat. 255.]

Power of Court

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order by such mandatoy or other relief as may be appropiate. [subsection (d) as amended by Public Law 87-225, 87th Congress, 1st Session, approved September 13, 1961, 75 Stat. 497.]

Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Certification or Certiorari

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

Scope of Review

[5 U.S. Code 706]. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or appli-

cability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.